Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

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October Term, 1973

No. 74-13

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GARRELL S. MULLANEY, ET AL,
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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The petitioners, Garrell S. Mullaney, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 30, 1974.

## OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court was issued June 8, 1971, and is reported at 278 A.2d 139; the opinion of the District Court for the Southern Division of the District of Maine was issued September 29, 1972, and is reported at 349 F. Supp. 149; the original opinion of the Court of Appeals was issued February 14, 1973, and is reported at 473 F.2d 943; the opinion of the Court of Appeals on remand from this Court pursuant to its order entered January 14, 1974, was issued April 30, 1974, and is not yet reported. This most recent Court of Appeals opinion appears in the Appendix to this petition.

## JURISDICTION

The latest judgment of the Court of Appeals for the First Circuit was entered on April 30, 1974. This petition was filed within 90 days



of that date. A stay of order has been granted by the District Court for the Southern Division of the District of Maine pending final disposition of this matter by this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1245 (1).

## QUESTIONS PRESENTED

1. Whether it violates the Due Process Clause of the United States Constitution to charge a jury, in a case of felonious homicide, that if they find on the evidence produced, from whatever source, that the State has established beyond a reasonable doubt an intentional and unlawful killing perpetrated by the defendant, the law presumes that homicide to have been committed with malice aforethought and that the burden is upon the defendant to convince them, by a preponderance of all the evidence, that the reductive factor of heat of passion on sudden provocation is present to warrant punishment of that felonious homicide as voluntary manslaughter rather than murder.

## STATUTORY PROVISIONS INVOLVED

Maine Revised Statutes, Title 17:

§2651. Definition (MURDER)

"Whoever unlawfully kills a human being with malice aforethought either express or implied is guilty of murder and ***."

§2551. Definition (MANSLAUGHTER)

"Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, ..., shall be punished...,"

## STATEMENT OF THE CASE

Defendant (Wilbur) appealed his conviction for felonious homicide punishable as murder to the Maine Supreme Judicial Court. Among other allegations, not here relevant, he alleged that the presiding justice at his trial erred when he charged the jury to the effect that if it was satisfied that the State had proven beyond a reasonable doubt an



intentional and unlawful killing, malice aforethought was "presumed" and the defendant would be guilty of murder, rather than manslaughter, unless he established, by a fair preponderance of the evidence, that he had killed in the heat of passion upon sudden provocation. For our present purposes this claim presented a single issue:

> Whether in thus placing the burden on the defendant to show, even by a preponderance of the evidence, the absence of malice aforethought, the Court denied him due process of law under the rule of In re Winship, 397 U.S. 358 (1970).

The Maine Court rejected any possible Winship violation on two grounds. First, it saw "no occasion to anticipate" that Winship would be applied retrospectively. State v. Wilbur, (Me. 1971) 278 A.2d 139, 146.[1]

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[1] Winship has been made retroactive by the case of Ivan V. v. City of New York, 407 U.S. 203 (1972).

Second, it felt that there would be an unwarranted extension of Winship if it were made to apply to a presumption of malice arising from proof beyond a reasonable doubt of an intentional and unlawful killing, since after such proof, the issue is no longer guilt or innocence of felonious homicide (and therefore there remains no issue as to criminality) but rather the degree of the homicide. In arriving at this conclusion, the Maine Court gave a comprehensive history of the law of felonious homicide as it has existed in Maine for over 125 years. State v. Wilbur, supra at 144-146.

Defendant then petitioned the United States District Court for the District of Maine for a writ of habeas corpus pursuant to 28 U.S.C. §2241 et seq. Defendant claimed a violation of his constitutional rights on several grounds, only one of which was deemed



to be of sufficient merit to be heard by the District Court; this was his Fourteenth Amendment (due process) claim just mentioned.

In its opinion sub nomine Wilbur v. Robbins,[2] 349 F. Supp. 149 (1972), the District Court rejected the theory of felonious homicide as constituting a viable part of the Maine law and proceeded to interpret the Maine criminal statutes relating to the definitions of murder and manslaughter on their face, without the aid of any State Court interpretation, concluding that Winship was applicable and due process violated. Wilbur v. Robbins, at 152, 153. The State seasonably appealed to the United States Court of Appeals for the First Circuit.

Prior to the decision of the First Circuit, the case of State v. Rollins, (Me. 1972)

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[2]After the District Court Opinion but before the First Circuit Court Opinion, Warden Robbins was replaced by Warden Mullaney.

295 A.2d 914 was decided. Rollins once again traced the history and theory of felonious homicide as it developed in Maine and reaffirmed the principles announced in State v. Wilbur, (Me. 1971) 278 A.2d 139. From the Wilbur and Rollins decisions the State (your Petitioners) extrapolated and presented to the First Circuit the following:

1. From the inception of Maine's statehood to the present the laws defining murder and manslaughter have been set forth in separate statutes.

2. However, in 1854 in the case of State v. Conley, 39 Me. 78, the Court, relying upon the common law and notwithstanding the statutes, explicitly established as the law of Maine:

> "When a party is charged in an indictment with the crime of murder, the felony actually committed is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the criterion of murder and is therefore manslaughter only. The two lower degrees of felonious homicide are embraced in the higher offense," Id. at 88, 89.

Thus in Maine law there was established a single underlying criminal entity as at the common law--felonious homicide--within which were fixed three degrees, two under the label of "murder" and a third lower degree denominated "manslaughter", for purposes of advance punishment differentiations.[3]

3. This interpretation was reaffirmed in the case of State v. Knight, 43 Me. 11, 137 (1857) in face of an attack substantively similar to that made in the instant case.

4. The statutes in Maine have never been altered by the legislature in any manner suggestive of an intention by the legislature to

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[3]Maine no longer has first and second degree murder. Thus the only degrees of felonious homicide which now exist are "murder" and "manslaughter".

repudiate the common law concepts as held by Conley and Knight, to be statutorily codified as the law of Maine, i.e. that there is a single generic crime, "unlawful (felonious) homicide," of which degrees, for penalty purposes, are designated by the names "murder" and "manslaughter".

5. Thus the rationale which has allowed the principle that the State has the ultimate burden to prove all essential elements of any crime beyond a reasonable doubt to exist side-by-side with the idea that the defendant must bear the ultimate burden of proof to reduce "murder" to "manslaughter" is that "murder" and "manslaughter" do not delineate separate crimes but are designations of the "degrees", for the purpose of establishing penalty consequences, of a single underlying crime--"unlawful (felonious) homicide."

The Court of Appeals affirmed the decision of the District Court on February 14, 1973.



The Court of Appeals rejected the theory of felonious homicide as announced by the Maine Court and went back into the Maine law to point out how the Maine Court was, at best, in error in interpreting its own law and, at worst, was attempting to come up with a new interpretation to escape the requirements of Winship. The Circuit Court then relied upon the wording on the face of Maine's statutes relating to "murder" and "manslaughter" and upon the casual language of certain cases existing in Maine's law to supply what it thought should be the proper interpretation of Maine's homicide law.

On April 26, 1973, the State (Petitioners) filed a petition for writ of certiorari with this Court praying that a writ of certiorari issue to review the judgment and opinion of the First Circuit of February 14, 1973. This petition was assigned Supreme Court Docket No. 72-1462.

After the filing of the petition for writ of certiorari by the Petitioners, the Maine Supreme Judicial Court decided the case of State v. Lafferty, (Me. 1973) 309 A.2d 647. In substance, Lafferty, while noting certain exceptions, rejected the right of the First Circuit to be the final arbitor of the internal criminal law of the State of Maine; it went on to reaffirm the substantive law of felonious homicide as announced in the earlier decisions.

As a result of the Lafferty decision, your Petitioners, on September 26, 1973, filed a supplemental brief to their petition for certiorari which was still pending before this Court. The supplemental brief explained the significance of the Lafferty decision as it related to the issue of federal/state relationships involved in the original petition.

On January 14, 1974, this Court granted a petition for certiorari in this case wherein



it vacated the February 14, 1973, opinion of the First Circuit and remanded the case back to the First Circuit for further consideration in light of the Lafferty decision.

In response to this Court's remand, the issue was resubmitted to the First Circuit with the resultant decision, reproduced in the Appendix to this petition, of April 30, 1974. In its decision on remand the First Circuit:

1. Accepted the position of the Maine Court that there exists in Maine a single crime, to wit: "unlawful (felonious) homicide" as announced in several decisions of the Maine Court, culminating with State v. Lafferty, (Me. 1973) 309 A.2d 647.

2. Found that In re Winship, 397 U.S. 358 (1970), and its holding that the due process clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged, commands that the Maine procedure of placing the burden on a defendant to mitigate, by a preponderance of the evidence, a prima facie case of felonious homicide punishable as murder (already proven beyond a reasonable doubt) to the lower degree of voluntary manslaughter violates due process of law.

3. Rejected the principle spelled out in State v. Wilbur, (Me., 1971) 278 A.2d 139:

> "[We do not accept the view that] the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it... [W]here under stated conditions the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter." (Emphasis supplied)



4. Concluded that "the burden of proof must be on the State throughout; not sometimes on the State, and sometimes on the defendant."

## REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES A SIGNIFICANT QUESTION CONCERNING THE SCOPE AND EFFECT OF THE CASE OF IN RE WINSHIP I.E. WHETHER WINSHIP'S HOLDING, THAT DUE PROCESS DEMANDS THAT THE STATE BEAR THE BURDEN OF PROOF, IN A CRIMINAL CASE, BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH AN ACCUSED IS CHARGED, SHOULD BE EXTENDED SO AS TO REACH FACTORS BEARING ON MITIGATION OF PUNISHMENT.

As a result of the remand from this Court to the First Circuit of January 14, 1974, and the resultant decision of April 30, 1974, the issue presented in Petitioners' first petition for certiorari (Supreme Court Docket No. 72-1462) relating to the question of the right of the First Circuit to interpret Maine Law, has been resolved in favor of Petitioners. This case now squarely presents to this Court for review the significant constitutional question, raised as the second issue in Petitioners' first petition, i.e. the question of the scope of the due process clause and its requirement as announced in In re Winship, 397 U.S. 358 (1970), that every fact necessary to constitute the



crime with which an accused is charged be proven beyond a reasonable doubt in order to sustain a conviction.

Starting from the premise of a single generic crime of felonious homicide as it has existed in Maine for well over 100 years, as pointed out in State v. Wilbur, (Me. 1971) 278 A.2d 139, State v. Rollins, (Me. 1972) 295 A.2d 914, and State v. Lafferty, (Me. 1973) 309 A.2d 647, the following conclusions obtain:

1. The crime to be proved in every "murder" indictment is felonious homicide, not "murder" or "manslaughter",

2. The elements of the crime of felonious homicide are (a) that the victim is dead; (b) that the defendant killed the victim; (c) that the killing of the victim was done voluntarily by the defendant - that is that the physical act or acts which caused the death were the result of an exercise of the defendant's will as opposed to reflexive or nonvolitional acts;

and (d) that the killing of the victim was unlawful (because it was neither justifiable nor excusable).

3. The law of Maine requires that each and every fact necessary to constitute the crime of felonious homicide, be proven beyond a reasonable doubt.

4. Malice aforethought is not a fact necessary to constitute the crime of felonious homicide but a factor whose presence or absence merely determines the degree of felonious homicide for purposes of establishing punishment.

5. The term "presumption of malice" is nothing more than a statement of policy, not related to fact finding, that once an intentional and unlawful (felonious) homicide has been proved beyond a reasonable doubt, the law will punish that crime most severely unless



mitigated by the defendant. These are matters of defense and not of guilt or innocence, i.e. criminality.

6. It bears emphasis that the "presumption of malice" rises upon proof beyond a reasonable doubt of an intentional and unlawful (felonious) homicide, not from proof of an unlawful (felonious) homicide alone. The additional requirement of intent being susceptible of proof by either the establishment of a specific subjective intent to take life or by facts which warrant the jury in inferring the intent to take life. Such facts being ones which, when viewed objectively, are characterized by a high death producing potential warranting an inference of intent.

7. Once the jury is warranted in finding the intent to take life, the effect of the "presumption of malice" is to indicate to the jury that they have found a prima facie case of felonious homicide punishable as murder as

opposed to a felonious homicide punishable as common law manslaughter,[4] or an innocent homicide.[5]

8. The effect of the "presumption of malice" on the defendant is to shift the burden onto him to establish, by a preponderance of the evidence,[6] that though he intentionally killed another human being and would therefor be otherwise guilty of murder, the intentional killing was done in the heat of passion on sudden provocation so as to warrant the punishment of the felonious homicide as voluntary manslaughter.

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[4]The degree of manslaughter not requiring as part of its proof the intent to take life.

[5]An innocent homicide being one which is not unlawful because it is either excused or justified.

[6]The defendant may meet this burden either by the introduction of evidence in defense or by pointing out that the state's case as presented would warrant such a finding.



Other than the instant case, your Petitioners know of no case that has extended the requirements of Winship to factors bearing on mitigation rather than guilt or innocence of the crime charged. The question of whether or not to limit Winship to matters of factual proof bearing upon the question of guilt or innocence, or whether to expand it to include matters of policy and procedure which follow the establishment of guilt, beyond a reasonable doubt, is one of great importance in the law.

Fairly comprised in such a question are such subsidiary questions as:

1. The scope and meaning of due process at a stage of the trial after guilt or innocence has been established and the question remaining being that of punishment only,

2. The effect of Winship upon presumptions, both as methods of factual proof and as mere pronouncements of public policy, and

3. Whether in fact there even exists at the mitigation (punishment) stage of trial any reason for requiring proof beyond a reasonable doubt and for limiting the use for presumptions since the rationale for the establishment of the requirement of proof beyond a reasonable doubt, the presumption of innocence, has been eliminated.

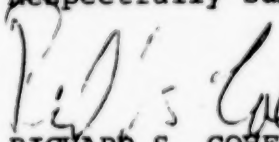
It is respectfully suggested that these and other important questions which exist in this case should be answered by this court.



## CONCLUSION

For all of the above reasons a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,



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APPENDIX



UNITED STATES COURT OF APPEALS
For the First Circuit

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No. 72-1348

STILLMAN E. WILBUR, JR.,
Petitioner, Appellee,

v.

GARRELL S. MULLANEY, ET AL.,
Respondents, Appellants.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

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Before COFFIN, Chief Judge,
ALDRICH and McENTEE, Circuit Judges.

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Vernon I. Arey, Assistant Attorney General, with whom Fernand LaRochelle, Assistant Attorney General, was on brief, for appellants.

Peter J. Rubin, by appointment of the Court, with whom Bernstein, Shur, Sawyer & Nelson was on brief, for appellee.

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OPINION ON REMAND

April 30, 1974

ALDRICH, Senior Circuit Judge. We are faced again with the duty of considering the propriety, in the light of In re Winship, 1970, 397 U.S. 358, of imposing upon a defendant indicted for murder, once an unlawful killing had been shown beyond a reasonable doubt, the burden of proving that his conduct met the statutory definition of manslaughter as distinguished from murder, or, as the Maine court, post, put it, of reducing the degree of the crime from murder to manslaughter.

The facts are these. At the trial the state's case against Wilbur, the present petitioner for a writ of habeas corpus, hereinafter defendant, was based upon circumstantial evidence and defendant's pretrial admissions that he had inflicted such severe



injuries upon the deceased with his fist and a blunt instrument that death had resulted within a few minutes. Although he did not testify or offer any evidence, defendant's theory of defense, as asserted in his pretrial statement introduced in full by the state, was that although he had struck the deceased, it was in the heat of passion suddenly provoked by an indecent homosexual overture, and that, therefore, he had not acted with malice aforethought, and was guilty of manslaughter, not murder. The court instructed the jury that it was the state's burden to prove beyond a reasonable doubt that the defendant had killed the deceased, and that the killing was intentional and unlawful. It also informed the jury that malice aforethought was an "essential and indispensable element of the crime of murder," but it charged that "malice aforethought may ...be implied from an unlawful killing" and "is presumed to be present in all homicides

until the contrary appears from the circumstances of alleviation to be made out ["by a fair preponderance of the evidence"] by the defendant."

In In re Winship the Court held that the Due Process Clause requires the state to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. On appeal from his conviction for murder, the instant defendant took the position that malice aforethought, which he equated with premeditation, was an intent more criminal in character than one formed under circumstances recited in the statute defining manslaughter, post, and that such higher intent was an element of the crime of murder and hence part of the state's burden of proof rather than a matter for him to disprove. The Maine court, however, held that under the law of Maine murder and manslaughter were but a single crime, felonious homicide, manslaughter



being a degree thereof; and that the defendant has the burden of proving by a fair preponderance the "reductive factors (sudden provocation and heat of passion)". State v. Wilbur, Me., 1971, 278 A.2d 139, 145. It reasoned that the "policy presumption [of malice], bearing as it does not on the guilt or innocence of felonious homicide but only upon the degree of and possible punishment for such homicide, should be accorded such procedural force as is required to make it truly effective" and that it did not anticipate that "Winship will be so extended as to reach the procedural requirements of Conley and Knight [post] as now interpreted." Id. at 146. On a petition for habeas corpus the district court, and ultimately ourselves, disagreed. Wilbur v. Mullaney, 1 Cir., 1973, 473 F.2d 943.

Therefore, in State v. Lafferty, Me., 1973, 329 A.2d 647, the Maine court rejected both our interpretation of the Maine law and the propriety of our effort to interpret it, as a

result of which the Supreme Court, on petition for certiorari, vacated our judgment and ordered us to give "further consideration in light of [Lafferty]."

U.S. (1/7/74).

In our prior opinion we were influenced by the fact that separate statutes defined murder and manslaughter;[1] and by references in State v. Knight, 1857, 43 Me. 11, 33, to murder

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[1] Murder
Section 2651. Definition
Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.
Manslaughter
Section 2551. Definition
Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought,... or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years....



and manslaughter as "offenses ... [which] import different degrees of criminality, and are punished with different degrees of severity," and in State v. Conley, 1854, 39 Me. 78, 88 to manslaughter as "wanting" "all the elements of murder." We now recognize that the separateness of the statutes is not deemed of any ultimate significance by the Maine Supreme Judicial Court and that both Knight and Conley, in addition to the language which earlier impressed us, contain language looking to the unitary nature of the crime embracing both murder and manslaughter, which language the Maine court deems controlling.

That the distinction between separate crimes and degrees of a single crime has not always been clearly conveyed is revealed in the charge given to the jury that convicted Wilbur. The trial court, after announcing that it would "describe the elements of the crimes of murder

and manslaughter," which it then did,[2] concluded as follows:

> "Now I have given you the general definitions of the crimes of murder and manslaughter with some further explanations; quoting largely, using largely the language of our court...from which you can see clearly the definitions of the two offenses."

Nevertheless, we now take as a given that there is "a single crime, unlawful (felonious) homicide." Lafferty, ante, 309 A.2d at 663 (Emphasis in orig.). We believe we may have erred in focussing in our previous opinion upon the structure of the Maine law, concededly an internal matter, Memorial Hospital v. Maricopa County, (2/26/74) U.S. ; 42 L.W. 4277, 4279, instead of upon the consequences, from the standpoint of the defendant,

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[2]The court spoke with apparent approval of this portion of the charge. "The jury [was]... thoroughly instructed as to the elements of unlawful homicide, murder and manslaughter." State v. Wilbur, 278 A.2d at 144.



in order to ascertain whether they were of constitutional proportions; or, as the Lafferty court put it, to see that state law as definitively interpreted "trespasses on no federally guaranteed constitutional rights." 309 A.2d at 662. The question is more properly put: does the fact that Maine regards murder and manslaughter as a single crime, denominated felonious homicide, but differing in degree, avoid Winship's strictures protecting "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" within the Court's intendment?

We start with a consideration of the measure of the difference effected by the concept of "reductive factors" of provocation and heat of passion as to which defendant has the burden. Under Maine law "malice aforethought" is not to be thought of as a general equivalent of premeditation. The term is "not a

designation of any subjective state of mind existing as a fact." Lafferty, ante, 309 A.2d at 664, quoting State v. Rollins, Me., 1972, 295 A.2d 914, 920. (Emphasis in orig.) Whether a killing has taken place with the subjective intention that death result (i.e., "a 'premeditated' killing," Lafferty, at 670, Wernick, J., concurring) or death has been caused without any specific subjective intent but by reckless or brutal conduct, "malice aforethought," "a fictional, metaphysical term of art" applicable to both acts, may be "extinguished by the fact that heat of passion upon sudden, adequate provocation spawned the conduct." Id., 672. Such facts (heat of passion, causation, sudden and adequate provocation) do not eliminate criminality but are "the facts legislatively assigned in advance to bind a judge's sentencing discretion" (id., at 667) and "mitigate the blameworthiness of the criminality." Id. at 671. Yet there is no question



but that what is required to extinguish "malice aforethought" are factual matters.[3] The contention is that, not being addressed to disproof of criminality but to proof of lesser blameworthiness, the placing of the burden on an accused to prove such factual matters falls beyond the reach of Winship.

In determining the constitutionality of a state statute (we draw no distinction between statutory and court-made law) the Court said in St. Louis Southwestern Ry. Co. v. Arkansas, 1914, 235 U.S. 350, at 362,

> "Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But...[w]e must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

As recently as In re Gault, 1967, 387 U.S. 1, where the state court had construed its statute

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[3]Indeed, we may think the fact that it is a circumstance preculiarly within the knowledge of the defendant is one of the reasons for the Maine rule. See 309 A.2d at 664.

as providing that certain proceedings were not even criminal, the Court disregarded that conclusion, holding that from the substantive, and hence constitutional standpoint they must be regarded as criminal. It said, at pp. 49-50, "To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience." 387 U.S. at 49-50. See also Duncan v. Louisiana, 1968, 391 U.S. 145.

In terms of substance the different consequences attaching to manslaughter and murder from the standpoint of the defendant in the state of Maine are obvious. For manslaughter the punishment may range from a nominal fine to "a fine of not more than $1000 or ... imprisonment for not more than twenty years." 17 M.R.S.A. §2551, ante. A defendant convicted of murder "shall be punished by imprisonment for life." 17 M.R.S.A. §2651, ante. In addition, the Lafferty court, 309 F.2d at 673, took



exception to our attaching significance to the fact that the public draws a distinction between a conviction for murder and a conviction for manslaughter, a distinction eloquently noted as far back as Blackstone.[4] The Court, however, in making constitutional assessments in Duncan v. Louisiana, ante, said, at 160, "The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments.'" We believe we are commanded to consider this factor not only by Duncan, but by Winship itself.

The Winship rationale is explicit.

> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that

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[4]See Blackstone, Commentaries on the Laws of England, 178; Malice is the "grand criterion which now distinguishes murder from manslaughter and other forms of killing." (Am. ed. Phila., 1772). See also Mueller, Comparative Criminal Law in the United States 134 (1970).

> he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." 397 U.S. at 363. (Emphasis supplied).

We cannot think that how these substantial differences with respect to liberty and stigma are achieved, vis-a-vis the defendant, is to be dismissed as a mere "procedural requirement," State v. Wilbur, ante, at 146, or, to put it another way, is beyond the reach of Winship, whose expressed holding is that the procedural requirement of burden of proof is a constitutional matter. Whether a defendant is to be regarded as a murderer, to spend his life in prison, or, as guilty of manslaughter, is to serve a term of years, with the possibility of parole -- or possibly only fined -- depends upon the absence, or existence, of certain facts. We cannot accept that simply by calling them "reductive factors" the determination of these facts occurs other than "during a criminal



prosecution." Were it otherwise, the important interests that concerned the court in Winship could be diluted to whatever degree judicial or legislative draftsmen might elect.

In holding that a burden of proof cannot be placed upon the defendant by the process of defining the crime we emphasize that we are not deciding that proof of intentional homicide can never justify a finding of murder to the extent that there must necessarily be an acquittal unless the state by evidence affirmatively disproves the existence of factors which would show the offense to be manslaughter. We have no quarrel with a rule that proof of certain facts may justify inferences, and we recognize when a jury is told of a permissive inference arising from the state's evidence unless the defendant makes a showing, or an "explanation," cf. Barnes v. United States, 1973, 412 U.S. 837, that in practical effect it may place upon him a burden of going forward. See Barnes at

846 n. 11. But this cannot be the strict burden of going forward in the sense of going-forward-persuasively-or-else-you-lose. See, e.g., Barnes at 845 n. 9. What we are rejecting is the principle spelled out in State v. Wilbur, 278 A.2d at 146, where the court said,

> "[We do not accept the view that] the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it....[W]here under stated conditions the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter."

Placing the burden on a defendant to reduce murder to manslaughter may be sound public policy if the state's purpose is to facilitate convictions for murder, but Winship teaches that it is constitutionally improper to facilitate convictions at the cost of imposing a burden of proof upon the defendant. The burden of proof must be on the state throughout;



not sometimes on the state, and sometimes on the defendant.

The order affirming the order of the district court is reinstated.

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the petitioners, on the date written below, did deposit a copy of the above petition for a Writ of Certiorari in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to Respondent's attorney as follows: Peter J. Rubin, Esquire, One Monument Square, Portland, Maine 04111.

Dated: July 24, 1974

RICHARD S. COHEN
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Augusta, Maine 04330